No. 14,912

IN THE

United States Court of Appeals

For the Ninth Circuit

ANNE G. MOHOLY, as Administratrix of the Estate of Philip F. Moholy, Deceased, and ANNE MOHOLY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the Judgment of the United States District Court for the Northern District of California.

APPELLANTS' REPLY BRIEF.

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PRELIMINARY STATEMENT.

The brief for the appellee was received March 16, 1956. By order of this court appellants were given until May 4, 1956, to file a reply to the appellee's brief. The argument contained in the brief for the appellee is divided into four sections that are respectively designated as A, B, C and D. For convenience and clarity the appellants' reply will follow the same designations.

REPLY TO APPELLEE'S ARGUMENT.

A. APPELLEE'S ASSERTION THAT "THE SICK LEAVE PAYMENTS HEREIN MADE DO NOT PARTAKE OF THE NATURE OF 'AMOUNTS RECEIVED THROUGH HEALTH INSURANCE'" IS NOT BORNE OUT BY THE ARGUMENTS ADVANCED IN SUPPORT THEREOF.

Appellee's first argument is stated as follows:

"As a practical matter of common every-day speech, continuation of an employee's salary by his employer during absence on account of sickness is not known as health insurance. Just like the continuation of salary during vacations it is part of the compensation paid for past and prospective services." It is respectfully submitted that the first of these statements is irrelevant and the second is demonstrably untrue. Stating that sick leave pay is not known as health insurance is simply raising a straw man to be demolished. We have never contended that the two terms are synonymous or co-extensive. It is obvious that *all* health insurance is not sick leave with full pay, and it is equally obvious that *all* sick leave with full pay is not health insurance. The appellee and the court below imply that because all sick leave with full pay is not health insurance, no sick leave with full pay can be health insurance. When this deduction is stated rather than implied, the fallacy becomes so obvious that we think it unnecessary to labor the point. Appellants concede that under various circumstances and arrangements sick leave pay would not constitute amounts received through health insurance. On the other hand, if an employee or a group of employees received compensation while sick, under a set of facts

ich include all of the requisites of health insur-
ce, such amounts do not lose their character as
ounts received through health insurance simply
ause they are *called* sick leave with full pay.
here, as in this case, an employer for a valuable
sideration agrees to assume the risk of loss by en-
ing into a legally enforceable undertaking to pay
employee compensation for sickness, all of the
uisites for health insurance have been met.

Appellee's second statement that "just like the
tinuation of salary during vacations, it is part of
compensation paid for past and prospective serv-
s" is just not true in the instant case. The pre-
e point has been adjudicated by the California
urts. *Adams v. City and County of San Francisco*
949), 94 C.A.2d 586 (rehearing by the Supreme
urt of California denied). This case, although
ed in the appellants' opening brief, is not adverted
in the brief for the appellee. It is unnecessary to
sider general statements gleaned by the appellee
om a New Jersey decision involving entirely dif-
ent considerations when the precise section of the
arter of the City and County of San Francisco
der which the payments herein concerned were
ade has been adjudicated by the California court
ving jurisdiction to make such adjudications.

Sections 140 through 157 of the Charter of the City
d County of San Francisco set up a comprehensive
vil Service system. With exceptions not relevant
re schedules of compensation are proposed by the
vil Service Commission and enacted into law by

the Board of Supervisors. Section 151 of the Charter states that all Civil Service employees shall receive two weeks' vacation with pay. Subsequently, Section 151.3 was adopted which provides that the rate of pay of municipal employees engaged in certain crafts shall be the same as the rate of pay fixed by collective bargaining by such crafts in private industry. In the *Adams case* a collective bargaining agreement provided for only five working days' paid vacation, and no sick leave pay at all. The court held that *vacation pay* is part of the employee's *compensation* and is governed by the collective bargaining agreement which was adopted pursuant to Section 151.3. Therefore, the employees were entitled to only five days' vacation pay since, by its subsequent enactment, 151.3 must be considered to have superseded Section 151 for these particular crafts.

On the other hand, the court held that sick leave pay is *not* part of the *wages* or *compensation* of the employee and therefore is not affected by the provisions of Section 151.3. Compensation while disabled or sick is provided for by Section 153 of the Charter. (Appellants' Opening Brief, App. p. i.) The court said that holiday pay, overtime pay, and vacation pay, all have some remote relation to working conditions and must be held to relate to compensation, but compensation for sickness or disability, under Section 153, is not a part of the employee's wages or compensation. The court said that it was somewhat comparable to medical benefits. "Payment for sick leave is a benefit given as an allowance payment on

a humanitarian basis in the interests of the employee's welfare." "Sick leave or disability leave pay is not a gratuity. There is no vested right to such compensation until the happening of the contingency, namely disability or sickness as defined in Civil Service Rule 32. (Appellants' Opening Brief, App. p. ii.) A rehearing by the Supreme Court of California was denied and the case remains the settled law of the State of California. We believe that the appellee will concede (certainly the Commissioner of Internal Revenue has conceded by the rulings referred to in Section D of Appellee's brief) that if the City and County of San Francisco had reinsured its liability assumed under Charter Section 153 with some private commercial insurance company, the amount paid to Captain Moholy would have been amounts received through health insurance. It is unrealistic to say that these payments do not partake of the nature of insurance because the City elected to carry the risk itself.

Appellee's next argument is that the plan under which Captain Moholy received the payments in question lacks the fundamental characteristics of health insurance. Appellants' opening brief sets forth the various features of the plan under which Captain Moholy received compensation for sickness. We argued (page 6) "Any enforceable obligation whether evidenced by a policy, a contract, or a charter provision, or regulation adopted pursuant thereto, whereby one undertakes to indemnify another against loss arising from a contingent or unknown event constitutes insurance."

Appellee does not deny that these features exist in the plan adopted by the City and County of San Francisco, but argues that they are negatived by the absence of a "fundamental and practical feature of health insurance". This "fundamental and practical feature of health insurance" is stated to be a custom or practice on the part of insurance carriers not to pay more than 75% to 80% of the insured's regular compensation. Of course, there is *nothing in the record* before this Court to substantiate this statement, and it is hardly a matter concerning which the court can or should take judicial notice. The rule quoted is apparently an underwriting rule claimed by one, Mr. Faulkner, to exist during and prior to 1940. It is perhaps superfluous to point out that Mr. Faulkner's qualifications are unknown and that he was not in court under oath or subject to cross-examination.

Whatever underwriting rules may have existed at the time Mr. Faulkner wrote his book, have no application to the issuance of health insurance in California. Section 10369.7 of the Insurance Code of the State of California permits the insurer to include at its option in policies of health insurance a limitation that the total monthly benefits for the same loss of time covered by all outstanding policies of health insurance shall not exceed the beneficiary's average monthly salary or average for the period of two years immediately preceding, whichever is greater, providing that this shall not reduce the monthly benefits to less than $200 per month. Thus, an insurer who elects to use this optional clause cannot reduce benefits be-

ow $200 per month even if the insured's salary is nly $100 per month. There is nothing in the rec- rd before this court, or before the lower court, upon vhich a finding could have been made that individual r group health insurance is not written in Cali- ornia for an amount equal to or in excess of the in- ured's earnings. Even if the alleged rule had been roved to exist it could not operate to prevent any nsurer in California from writing policies in ac- ordance with State Law.

Appellee's next argument is "the sick rule here efore the Court, unlike health insurance, is expressly dministered as an integral feature of a department's *ompensation* plan for its members". We believe that his contention is completely disposed of by the de- ision in *Adams v. City and County of San Fran- isco,* discussed supra. In that decision, the court learly brings out the fact that while benefits paid nder Charter Section 153 are a feature of a depart- ment's personnel policy they are not a part of its ompensation plan. Certainly the City would be en- itled, as an integral feature of its personnel policy, o purchase and maintain a commercial health in- surance policy for the benefit of its employees. The fact that it elected to carry its own liability and save the excess premiums that would be required does not change the nature of the benefits received by the em- ployee. Nearly all of the arguments raised in appel- lee's brief boil down to the fact that the City elected to carry its own risks and not reinsure with a com- mercial health insurance company.

Appellee attempts to point out certain dissimilarites between the sick rule of the San Francisco Fire Department and health insurance. Since appellee studiously refrains from alleging that these things are essential requisites of health insurance, the alleged omissions would seem to be immaterial. The statement that the fireman has no direct right to sue for claimed benefits is clearly erroneous. The right to sue for benefits on a commercial policy of health insurance is not conferred by the policy of insurance, but by the law which permits an action to be brought for breach of contract. Insurers are permitted to establish certain conditions which must be met before suit can be brought on the policy. Similarly, a fireman must exhaust administrative remedies before he can bring an action on his claim. *Adams v. City and County of San Francisco,* supra. Appellee next states "no premiums are charged". There is no requirement in the taxing statute that premiums must be charged. The Bureau of Internal Revenue has never denied the propriety of the employer furnishing health insurance at his own expense. The same answer is applicable to appellee's statement that no trusteed fund is provided for. We know of no judicial definition of health insurance that includes the use of a trusteed fund. No authority to that effect is cited and we believe that there is none.

Appellee next states, "obviously the San Francisco Fire Department does not write insurance as part of its public function; neither is it licensed as a health insurer". If this statement seems obvious to

appellee it can only be so because of appellee's unfamiliarity with the laws of the State of California. The City and County of San Francisco, a governmental subdivision of the State of California, both can and does engage in insurance activities as part of its public functions. For example, Section 172.1 of the Charter of the City and County of San Francisco sets up a health service system for the purpose of procuring or providing medical care for the employees covered by such system. Subdivision 3 of Section 172.1 gives the health service board the power to either adopt a plan for rendering medical care to members of the system, or for the indemnification of the cost of said care, or for obtaining and carrying insurance against such cost.

The Supreme Court of California held that the establishment of a health system for City employees is a municipal affair, and that Section 172.1 of the Charter was constitutional and a valid exercise of the municipality's governmental powers. *Butterworth v. Boyd* (1938), 12 C.2d 140, 82 P.2d 434, 126 ALR 838. The court directly passed upon the point advanced by appellee that the City is not licensed as an insurer. In this connection the Court said: "It is suggested that the Charter provision is in conflict with the State Insurance Code in that it authorizes what is, in effect, an insurance business without a certificate of authority from the Insurance Commissioner. . . ." "A still more obvious answer to counsel's suggestion is that the Insurance Code deals with the private business of insurance and neither ex-

pressly nor impliedly purports to regulate governmental activities of municipalities. It is, of course, a well-settled doctrine that general words in a statute which might have the effect of restricting governmental powers are to be construed as not applying to the State or its subdivisions." The reasoning of the court is just as applicable to benefits paid under Section 153 as to benefits paid under Section 172.1.

Another type of insurance carried by the municipality of San Francisco is Workmen's Compensation Insurance. Section 3300 of the Labor Code of the State of California classifies cities and counties as among the employers covered by the State Workmen's Compensation laws. Under Section 3700 of the Labor Code every employer, except the State and its political subdivisions, are compelled to carry insurance against liability or secure a certificate and consent from the Director of Industrial Relations to self-insure. Thus, while a city has the same liability as any other employer, under Section 3300 it is permitted by Section 3700 to make its own arrangements to take care of this liability. Section 172 of the City Charter reads in part as follows:

> "The benefit provisions of the Workmen's Compensation insurance and safety law of the State of California as they affect the benefits provided for or payable to or on account of officers and employees, including teachers of the City and County, shall be administered exclusively by the Retirement Board, provided that the Retirement Board shall determine whether the City and County through the Retirement System shall

assume the risk under the said law in whole or in part, or whether it shall re-insure such risks, in whole or in part, with the State Compensation Insurance Fund. Benefits under such risks as may be assumed by the City and County and premiums under such risks as may be re-insured shall be paid by the Retirement System, and in amount equal to the total of such benefits and premiums as determined by the actuary for any fiscal year, including the deficit brought forward from previous years, shall be paid during such fiscal year to the Retirement System by the City and County."

The government conceded, and the court below found, that amounts paid to Captain Moholy under the above Charter provision constituted payments received from workmen's compensation. That issue is not before this court, but it illustrates the point that the City and County of San Francisco, as a subdivision of the State of California, can write insurance as part of its public function and does not require a license therefor from the State Insurance Commissioner.

Appellee's final argument under Division A of its brief is based upon an allegation that there is no distribution of risk under the plan here involved. If the plan were not in existence each fireman would lose his compensation whenever he was sick from a cause not covered by state compensation laws. The risk of loss of wages from sickness is shifted from the individual fireman to the City and County of San Francisco to the extent that the City has assumed the

risk under the statutory plan. As far as the distribution of risk is concerned the City and County of San Francisco is in no different position than any other insurer. The City and County of San Francisco, like any other insurer, must assume that all of the beneficiaries will not become ill at the same time, but that the incidence of illness will follow a more or less established statistical pattern. To quote the appellee's brief, page 12, "By diffusing the risks through a mass of separate risk-shifting contracts the insurer casts his lot with the law of averages." Probably the City has more beneficiaries and therefore a wider diffusion of risk than many health insurance companies. Appellee has confused the risk of loss with the actual payment of the claims. Whether the insurer is a commercial health insurance company or the City and County of San Francisco, the incidence of loss is shifted from the beneficiaries to the insurer and the risk is distributed over the entire number of beneficiaries who have coverage under the arrangement. The commercial insurance company would necessarily pay claims from premiums collected. If it chose to do so, San Francisco could have re-insured its claim and paid premiums to a commercial health insurance company. Precisely because there is a wide diffusion, or distribution of risk, the City and County of San Francisco finds it less costly to pay the claims directly than it would be to pay them in the form of premiums to an insurance company which must not only collect a premium large enough to cover all potential claims, but also additional amounts for reserves, taxes, overhead and dividends.

Suppose a commercial insurance company wrote a policy covering all of the employees of the City and County of San Francisco and had no other policy holders. And suppose the entire premium for the policy were paid by the City and County of San Francisco. Would appellee seriously argue that benefits paid to an employee by the insurance company were not "amounts received through health insurance"? We know of no instance where the Commissioner of Internal Revenue has claimed that benefits from a commercial health insurance company lost their character as amounts received through health insurance because the premium on the policy was entirely paid by the employer.

Appellee cites *California Physicians Service v. Garrison,* 28 C.2d 790, 172 P.2d 4, in support of its position. This case is not in point because there was no contractual obligation on the part of the California Physicians Service to defray medical expenses incurred by the organization's dues-paying members. The Supreme Court held that the California Physicians Service merely acted as an agent for the collection and distribution of funds. Medical services to the dues-paying members was offered by the professional members of the organization. The corporation, i.e., the California Physicians Service, did not agree to pay the medical expenses. It merely agreed to collect the dues and prorate them among the doctors who were members of the organization. The Court pointed out that the compensation of the doctors could be high or low, depending upon the incidence of sickness and the

number of beneficiary members paying dues. All risk is assumed by the physicians, not the corporation. The court pointed out that under the whole plan of operation, the corporation was rendering a service and its function was not one of indemnity. The Chief Justice concurred in the decision solely on the ground that the legislature by the enactment of Civil Code Section 593a exempted such organizations, as California Physicians Service, from regulations by the Insurance Commissioner, substituting instead supervision by a professional board and the State Attorney General. In any event, it is clear that this case has no bearing upon a situation where the employer has a legal obligation to pay all claims in accordance with the plan. The decision of the same court in *Butterworth v. Boyd,* supra, is more to the point.

B. IN THIS SUBDIVISION APPELLEE ARGUES THAT UNDER THE INTERNAL REVENUE CODE OF 1939, CONGRESS DID NOT INTEND TO EXEMPT THE KIND OF PAYMENTS HERE INVOLVED.

First, appellee argues that if Congress had intended to exempt from taxation payments such as those made by the City and County of San Francisco, it could readily have done so by deleting the phrase "through accident or health insurance or under Workmen's Compensation Acts". Appellee then says that the section would have read as the taxpayer, in effect, urges this court to read it, so as to exempt "amounts received as compensation for personal injuries or

ckness". This, most emphatically, is not what the ppellant is urging the court to do. We have repeatdly, in this and in our opening brief, disclaimed any uch contention. We do not say that *all* payments rom employers to employees, as compensation for ckness, constitute health insurance. On the other and, we do say that if benefits are paid under a plan aving all of the requisites of health insurance, the xemption should not be restricted to commercial ealth insurance companies.

Second, appellee argues that if our interpretation f Section 22(b)(5) is correct, Congress would not ave needed to have amended Section 22(b)(5) in 942. Appellee's reasoning is obscure, but it does efer to the amendment of Section 22(b)(5) as exending the exemption to a limited and specified catery of paid sick leave. Just what a limited and speci-ed category of paid sick leave has to do with the mendment in question is not apparent. The Amendnent refers to, "amounts received as a pension, anuity, or similar allowance for personal injuries or ickness resulting fom active service in the Armed Forces of any country". "Similar allowance" apparntly means similar to a pension or annuity. Appellee s again attempting to force appellants into a posiion which we have constantly disclaimed. We reitrate that it is not our position that *all* sick leave payments constitute amounts received through health nsurance. To constitute insurance there must be an nforceable obligation whereby one undertakes to ndemnify another against loss arising from a con-

tingent or unknown event. These requisites are all present in our case. We do not know, and the Congress in 1942 could not know, whether those requisites would be present in all instances where amounts were received as a pension, annuity, or similar allowance from *any country.*

Appellee's third argument is based upon a supposed analogy between Section 22(b)(1) and Section 22(b)(5). The House-Senate conference report on the Revenue Act of 1951 contains the following comment upon the amendment referred to in appellee's brief:

> "This amendment amends Section 22(b)(1) of the Code (relating to exclusion of life insurance proceeds from gross income) to provide for a limited exclusion for amounts paid by an employer to the beneficiaries of an employee by reason of the employee's death." Congressional Report U.S. Code Congressional Service, Vol. II, p. 2125.

The $5,000 limitation may have been a primary purpose of the amendment. The courts otherwise *might* have held that a contract of an employer providing for the payment of such amounts to the beneficiaries of an employee by reason of the death of the employee *were* life insurance, in which case the beneficiaries would have had the exemption without the $5,000 limitation. The amendment could hardly be called an empty gesture if its only result were to eliminate the type of litigation which has resulted from the Treasury's interpretation of Section 22(b)(5).

One might ask why Congress did not clarify ection 22(b)(5) at the same time it adopted the larifying amendment to Section 22(b)(1). The an- wer seems to be that at the time the Revenue Act f 1951 was before the Congress the Commissioner f Internal Revenue had adopted a fairly reasonable nterpretation of Section 22(b)(5). (See the brief or the appellee, pp. 26-27.) At the time the Revenue ct of 1951 was before Congress, the Bureau of nternal Revenue had ruled that disability benefits eceived by employees under the New Jersey Tempo- ary Disability Benefits Law and the California Un- mployment Insurance Act were not taxable income. he Treasury had ruled that such payments were xempt as a payment under a form of health and acci- ent insurance. IT 4000, CB 1950-1, 21. The Treasury lso ruled that New York disability payments were milarly exempt, whether made by the State Insur- nce Fund, by an insurance company, or under a self- nsured plan. IT 4060, CB 1951-2, 11. There is no ubstantial difference between the benefits paid under he California Unemployment Insurance Act and hose paid under Section 153 of the Charter of the ity and County of San Francisco. However, after he Treasury completely reversed its position, or re-evaluated'' its position (appellee's brief, p. 28), ongress was constrained to intervene. This it did by ompletely rewriting the law in the Internal Revenue ode of 1954, so as to exempt from taxation prac- ically all of the payments which the Commissioner as attempting to tax.

To summarize, it appears that Congress did not amend Section 22(b)(5) at the same time it amended Section 22(b)(1) because at that time the Commissioner's interpretation of Section 22(b)(5) was in accord with the Congressional intent, but when the Commissioner reversed his rulings and attempted to tax that which Congress had intended to be exempt, Congress restored the exemption by enacting Section 105(d) of the Internal Revenue Act of 1954.

C. THE DECIDED CASES.

Under this heading appellee discusses one of the three cases cited by appellant in support of this appeal. Appellee attacks the Seventh Circuit's decision in *Epmeier v. United States,* 199 F.2d 508, on several grounds. First, appellee attacks the decision on the grounds set forth in subdivisions A and B of its brief and which we have heretofore answered. Second, irrespective of whatever weight might here be accorded the Seventh Circuit's decision in *Epmeier v. United States,* appellee claims that the instant case is clearly distinguishable from *Epmeier* on its facts. For some unexplained reason, appellee seems to feel that the fact that San Francisco firemen are civil service employees makes their sick-pay benefits a portion of their compensation. We believe that this contention is decisively disposed of in *Adams v. City and County of San Francisco,* supra. Appellee further states that "the Court appears to have relied upon the

ıct that the employer insurance company had stat-
ory authority to insure health risks and, in fact,
rote disability insurance as part of its business".
his statement was first made in a publicity release
the Commissioner of Internal Revenue after the
pmeier decision. It has been regularly restated in
l of the briefs prepared by the government on all
the cases which have arisen on the point. Appar-
ıtly, this constant reiteration as a fact of something
hich was not adverted to in the *Epmeier* decision
ıs had some effect, since it appears in the opinion
the court below. As we state in our opening brief
ere is not a word in the *Epmeier* opinion which in-
cates that the decision was affected in any way by
ıe fact that the employer was an insurance company.

Appellee did not discuss *Herbkersman v. United tates,* 133 F.Supp. 495, now pending on appeal to ıe Sixth Circuit, or *Haynes v. United States,* 1955 CH Par. 9231, now pending on appeal to the Fifth ircuit, apparently for the reason that these cases ere decided on the authority of *Epmeier v. United tates,* supra. Appellee does rely, however, on *Bran-ım v. United States,* 136 F.Supp. 342, now pending ı appeal to the Sixth Circuit, which distinguished ıe *Epmeier* case. This case can be distinguished rom the instant case because the court found that ıe plan was purely voluntary, constituted no con-ract, and conferred no right of action. In our case ıe appellants' rights arise under Section 153 of the harter and are enforceable at law. *Adams v. City nd County of San Francisco,* supra.

For the sake of completeness, one other case should be mentioned here which was decided after appellee's brief was filed. On March 22, the Tax Court of the United States decided the case of *Joseph Oliva,* 25 TC No. 153. This case involved disability benefits paid to an employee of the Standard Oil Company in the state of Pennsylvania. A majority of the court decided adversely to the taxpayer on the authority of *Branham v. United States,* supra, and the decision in this case in the court below. In our opinion, the dissenting opinion correctly sets forth the law in the following language:

> "Although the broad issue before us in this case is whether the benefits received under the Esso sickness benefit plan are excludible from gross income of the taxpayer under section 22(b)(5) of the Internal Revenue Code of 1939, there are involved in that question two separate subissues; first, is the benefit plan a contract of health insurance and, second, if so, is the term 'health insurance' as employed in that section broad enough to include employer-purchased or financed health insurance. Put another way, the second subissue may be stated as, whether the term 'health insurance' may be limited in its meaning to only the ordinary commercial type of health insurance which is evidenced by a formal policy purchased from one generally engaged in the business of selling such insurance to the public.
>
> Congress has clearly expressed the intention that 'amounts received through * * * health insurance * * * as compensation for * * * sickness' are to be excluded from gross income. The majority holding is to the effect that this clear lan-

guage means that only such amounts as are received through insurance expressed in formal health insurance policies purchased from commercial purveyors of such policies are to be so excluded. In my view such a judicial amendment to the law cannot be justified. While it is true that courts may add words to a statute or disregard words which are employed, this is true only where to do otherwise would do violence to an evident legislative scheme or plan. No such underlying plan is apparent here nor is one pointed to or relied upon by the majority.

In my opinion the sickness benefit plan here in controversy is a contract of health insurance under the reasoning of Epmeier v. United States, 199 F.2d 508 [42 AFTR 716], and the benefits received thereunder are excludible from the gross income of the petitioner under section 22(b)(5)."

D. THE ADMINISTRATIVE POSITION.

The subsection of appellee's argument, entitled "D" an historical statement of the Commissioner's anging position on the issue here involved. About e only thing that we can derive from this history the fact that the Commissioner, like the courts, s had a great deal of difficulty in making up his ind on the issue. Until some time in 1952 the administrative position was substantially in accordance ith the contentions of the appellants herein. Effeve January 1, 1953, the Commissioner reversed himlf and decided that health insurance, as used in ection 22(b)(5), is limited in its meaning to the

ordinary commercial type of health insurance which is evidenced by a formal policy purchased from one generally engaged in the business of selling such insurance to the public. The fact that until 1952 the Commissioner generally adopted a position in favor of the exemption probably accounts for the dearth of decided cases until quite recently. Now with cases pending in the Fifth and Sixth Circuits, as well as the instant case before this Court, the Commissioner, in all probability will soon learn whether he was right prior to 1952 and wrong thereafter, or vice versa.

CONCLUSION.

For the reasons set forth herein and in our opening brief, we submit that the decision of the District Court below should be reversed and remanded to the District Court with directions that the District Court enter judgment for appellants and against the defendant, in accordance with the prayer of the complaint.

Dated, San Francisco, California,
May 2, 1956.

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